INDEX.

	Page
Question presented	1
Statement	2
Summary of argument	12
Argument	13
Conclusion	23
State Exhibit No. 15—Affidavit of J. Ben Warren, Esq.	8

Cases Cited.

Summerour v. Fortson, Judge, 174 Ga. 862	21
United States ex rel. Goldsby v. Harpole, 263 F. 2d 71 (C. A. 5, 1959)	12, 18, 19, 20, 21
Williams v. Georgia, 349 U. S. 375	13
Williams v. State, 210 Ga. 665	20
Williams v. State, 211 Ga. 763	20

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 376.

PRESTON COBB, JR.,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

BRIEF

For Respondent in Opposition to Granting of Writ of Certiorari to Review Judgment of Supreme Court of Georgia.

QUESTION PRESENTED.

May a competent court-appointed defense counsel make decisions in trying a case that will waive constitutional rights of a defendant who is a 15-year old Negro?

STATEMENT.

We are unable to accept the statement of facts as given by the Petitioner and therefore wiil expand that statement with additional facts.

"**Crawford Ezell,** Deputy Sheriff of Jasper County, sworn for the State, testified that he assisted in the investigation of the death of Mr. Coleman Dumas; that on the morning of June 1, 1961 he first saw the defendant, Preston Cobb, Jr., in Mr. Coleman Dumas' station wagon, coming out of the colored school yard; that Eugene Tinsley was with the defendant; that he had been searching for the station wagon and he arrested the defendant and Tinsley at that time; that later that day he had a conversation with the defendant at Gray, Georgia, in the presence of James Carnes and V. T. Murphy; that Sheriff Hawkins and a deputy (Jones County officers) were there too and George Lawrence; that the defendant made a statement, freely and voluntarily, as follows:

"I got on a school bus driven by Billy Goolsby about 5:30 and went to Henry Jones store and bought a package of cigarettes and started walking home and caught a ride on a pulpwood truck with a 92 tag on it; rode as far as the grave yard before you got to Mr. John Alexander's house and walked almost to the Dumas home; caught a truck and came back to Hillsboro, and went back to Henry Jones store and bought a package of cigarettes again, and caught another truck and went back to the Church in front of my house, and walked back to Mr. Coleman's house; went across the road in front of his house and sat down 15 or 20 minutes; went in the yard and got a rifle from the station wagon, and sat it beside

the door steps at the back door; then I went in the house. Mr. Coleman looked around and asked me what I wanted; I told him nothing and walked back out the kitchen door and got the rifle and went back in the house, stood by the table in the kitchen and shot him while he was sitting in the chair in the living room; set the rifle back outside the door, and went back in the house and got him and layed him down on the walk next to the car to open the door; put him on top of the spare tire in the back of the station wagon; then went back by the door steps and got the rifle and put it in the station wagon; came back up the road and turned to the right, came by Beck Coggle's house and up the road by Barron Fulton's house and stopped just around the curve from Barron Fulton's house, opened the back of the station wagon, picked him up and put him in the ditch. . . . He said that Mr. Dumas was living when he put him in the truck, but when he stopped and put him in the ditch, said he was dead. . . . Threw out a pair of bloody pants in the ditch; he was laying on the back; the right rear tire went flat when I left Mr. Coleman's yard, after I put Mr. Coleman in the ditch, I went back to Bud Maddox's store and changed tires, and borrowed a jack from Bud Maddox and the jack would not work; while I was putting the jack back Marshall Tinsley came by and I got a jack from him, and Marshall helped change the tire; then I followed Marshall, who was driving his aunt's car, Nancy Coggle, to Beck Coggle's house; in the car with Marshall driving was Nancy Coggle, Beck Coggle, Odell Coggle, and one other boy and girl; in about 5 minutes Preston, Marshall, Odell, Marvin Ghant, and Bobby Ghant, Marvin and Bobby I had

picked up at Maddox store, left and came back to Hillsboro and put out Marvin and Bobby Ghant; then we went to Bud's beer joint near Round Oak, and bought 3 cans of beer and I gave $1.00 for the beer and one half pint of bur head wine; then we went to Alex Jackson's house, picked up Ann Jackson and went back to Bud's Beer Joint, bought 2 cans of beer and a package of skins; played three or four records, then carried Ann Jackson home, then Marshall drove to Monticello, went to the school house, and left and came by near Dude's store and talked to Jessie Thurman; then we left and went back to Beck Coggle's house and put Odell out; then Marshall and I went back to the Turner place about 1:30 in the morning and went to sleep and slept till day break; left there and went to Macon by Wiley Hattaway's house and turned around at car lot in Macon and came back through Gray to Eatonton about 9:00 o'clock in the morning; parked close to white barber shop in Eatonton and went to Daraney Store and bought black pants, blue shirt and shoes and red and black socks; went to J. & B. Supermarket and got some ice cream, one pint of ice cream, and one drum stick; then we drove to Shady Dale, picked up LeRoy Little at Perry's store and started to Monticello, turned around at Machin, took LeRoy Little back to Shady Dale, then we came to Monticello, and then went to the colored school; got out at the school house, and we started to leave and then they stopped me. . . . Yes, said when I took Mr. Coleman out of the car his pocket book fell out of his pocket, I picked it up and put it in the car; on the way to Macon I gave out of gas near Round Oak, and caught a ride back to Mr. Crutchfield's

and bought $1.75 worth of gas; then I drove back to Mr. Crutchfield's and bought $2.00 worth of gas; I also bought $2.00 worth of gas on the way out of Macon, the last station on the right before you cross the river; I bought gas, $1.00 worth at Sinclair station at the forks of the Eatonton and Shady Dale road; paid $6.00 or $7.00 for the shoes, .45¢ for socks, $2.00 for pants, and $1.59 for the shirt; paid .31¢ for ice cream, and he said the $20.00 gold piece, which Mr. Ezell got out of my pocket, I got out of Mr. Coleman's pocket book, also $28.00; I took all of his papers out of his pocket book and put them in mine; I tore up the pocket book and put it in front of the brick store at Round Oak. About 2 weeks ago Mr. Coleman and I went fishing; the next day he asked me if I ate all of the fish; I asked him what fish; then he cursed me; after I fed the calves I left and went home; on yesterday which was June 1st, I made up my mind to shoot him; while unloading gravel at the fish pond Mr. Coleman brought up about the fish and told me I had better be careful how I talked to an old man like him, he said he was too old to be playing and that he might blow my brains out at any minute; this was about 4:30, and I made up my mind to kill him; I went to my house and got my brother's pistol, and left the pistol across the road in front of Mr. Coleman's house. . . . He said that Mr. Dumas was sitting in the chair with his hat on reading the Market Bulletin. The boy said he put it (the hat) in the station wagon. He said Mr. Dumas was sitting with his side turned to the door, and he shot him right over his ear. . . . He said he threw the dirty pants out of the station wagon in the ditch when he put Mr. Dumas

in the ditch. . . . Said he unloaded the rifle on the back steps, and threw it off on the left side of the back steps in the grass."

This witness identified a rifle which was in the station wagon and which the defendant said he shot the deceased with and put back in Mr. Dumas' station wagon. He also identified a hat he found in the station wagon which the defendant said he put in the station wagon and he further testified that the two holes in the hat were fresh at the time he found the hat that morning; that he was present at Mr. Dumas' home when the officers, along with members of Mr. Dumas' family searched for the cartridge hull and found it, a 22 caliber hull, it was off to the left of the step, not too far from the steps; that there was a spot of blood where the defendant said he laid Mr. Dumas down on the ground to open the door; that the defendant told them the body was about halfway between Mr. Barron Fulton's house and Mr. Odell White's house, lying in a deep ditch. This witness identified a pair of trousers that were laying right near Mr. Dumas in the ditch and testified that the defendant said he laid Mr. Dumas on his back and they found him in the ditch lying on his back; that the defendant had some change in his pocket, also a wallet with some of Mr. Dumas' papers in it, also a 20 dollar gold piece in the pocket book; that the defendant identified the $20.00 gold piece as having come from Mr. Dumas' pocket book (identifying the pocket book and the papers contained therein). This witness identified photographs of Mr. Dumas' body at the time he was found, a photograph of a spot of blood as a true representation, and further testified that he ascertained that the defendant charged to his mother at Mr. Jones' store two packages of cigarettes and one box of .22 long rifle hollow point cartridges, sold to Preston Cobb by Mrs. Margaret Jones, he saw the ticket.

On cross-examination this witness testified that he was not with them when the body was first found; that the body had been found when the defendant made that statement; that the body was found the day after the homicide, close to dinner time; that the other billfold was found in Round Oak where the defendant told him it was, by the brick store; that they first took them to Monticello jail; that the defendant said at that time he had not done the killing; that the defendant did not ever say he used the pistol, he said he used the rifle; that the defendant said he left the pistol at the road and then after sitting in front of the house he went to the station wagon and got the rifle and put it by the back door, then went in the house and left the rifle outside; that he did not know whether the pistol was in the station wagon or not, he picked them up and took them to jail in his pickup truck and left the station wagon, the patrolman brought it in, he believed, "I'm not sure".

On redirect examination this witness testified that he was not present at Round Oak when they got Mr. Coleman Dumas' pocket book, Mr. Murphy got it.

On recross-examination this witness testified that the defendant in his statement did not say he was afraid of Mr. Dumas because he made the statement "I ought to blow your brains out for talking to an old man like that"; that the defendant did not say he was afraid of Mr. Dumas, "the best I remember" (pp. 36-49 of the record).

James E. Carnes, Special Agent for G. B. I., sworn for the State, testified that he assisted in the investigation of this case and he corroborated the testimony of Deputy Sheriff Crawford Ezell. This witness testified that the statement made by the defendant in his presence was made freely and voluntarily and he identified certain photographs as true representations of what Mr. Dumas looked like in the ditch; and testified that he was present

when the cartridge hull was found at the home of Mr. Dumas; that the defendant gave him and Mr. Ezell the information as to the location of the body before it was found and they gave that information to the people who found him; that they passed the information on to Coleman Dumas, Jr. (pp. 50-55 of the record).

V. T. Murphy, Deputy Sheriff, sworn for the State, further corroborated the testimony of officers Ezell and Carnes (pp. 55-58 of the record).

Frank R. Ezell, Sheriff, further corroborated the testimony previously adduced by the State (pp. 58-60 of the record).

The Court appointed attorney, Honorable J. Ben Warren, who represented the Petitioner during his trial, on November 2, 1961, made the following sworn statement: (r. pp. 234-237)

STATE EXHIBIT NO. 15.

Affidavit of J. Ben Warren, Esq.

Georgia, Jasper County.

Personally appeared before the undersigned officer duly authorized to administer oaths, J. Ben Warren, who, after first being duly sworn, deposes and says:

1. That on June 7, 1932 he received a B. Ph. degree from Emory University, in Atlanta, Georgia, and on December 20, 1933, he received the LL. B. Degree from Emory University Law School in Atlanta, Georgia, and on Jan. 30, 1934, he was admitted to the practice of law in Georgia in Atlanta, Georgia, since which latter date he has actively engaged in the general practice of law in both State and Federal Courts in Georgia, except a two year period of service in the U. S. Army from March 1944 to March 1946.

2. That during his period of practice he has defended more than thirty (30) capital felonies, including the case of Preston Cobb, Jr., who was found guilty at the August Term, 1961 of Jasper Superior Court, and in only three other cases was a verdict of guilty without recommendation for mercy rendered, and in those three cases a new trial was obtained by deponent, and on second trial two years was given to two defendants, and a life sentence to the other defendant. Of the more than thirty (30) cases defendant by deponent in only the Cobb case above referred to was the evidence that of cold-blooded pre-meditated murder, without any evidence of mitigation or extenuating circumstances.

3. Deponent further states that in the trial of the Cobb case in August, 1961, the racial issue was never raised—nor was there, in his opinion, any prejudice or bias against the defendant because of his race in any of the twelve jurors, the officers of the Court, or in the community, prior to or during the trial of said case, and if there had been, deponent most assuredly would have ASKED the court for a change of venue, in order to assure a fair and impartial trial for the defendant.

4. Deponent further says that he has resided and practiced law in Jasper County, Georgia since April 1937, and from his personal knowledge and association with the citizens of Jasper County he believes that the twelve men selected and sworn to try the Cobb case are among the highest type citizens of the county, as attested to by the following facts within the personal knowledge of the deponent, to wit:

(1) 4 of the 12 attended or graduated from college.

(2) 6 are members and two are deacons in the Baptist Church.

(3) 5 are members of the Methodist Church, one of whom is Superintendent of the Monticello Methodist Sunday School and a former member of the U. S. Marine Corps.

(4) 2 are Civil Service employees of the U. S. Government.

(5) 1 has been scoutmaster of a Boy Scout Troop for more than ten years.

(6) Six (6) of the 12 are veterans of the U. S. Armed Forces.

(7) All twelve (12) of the jurors own their homes or farms on which they live, representing a conservative net worth of more than $150,000.00 of property.

(8) All are married and all have children except one.

(9) Six of the twelve own part or all of the businesses which they operate.

5. Deponent further states that, based on his personal knowledge of the twelve jurors, their competence, character and integrity, the fact that the defendant in the Cobb case was a negro and his murder victim a white man had no bearing or influence on their verdict, and had the defendant been white,—on the same evidence their verdict of "Guilty" without recommendation for mercy would have been the same.

6. Deponent further states on his knowledge of the negroes of Jasper County that had a negro or more than one negro been chosen as a juror on the Cobb case, the verdict of the jury would have been the same as that rendered.

7. Based on the statement in the preceding paragraph this deponent further states that, it is his honest belief that Preston Cobb, Jr. could not have received any fairer trial even if members of his race

had been on the jury which tried him, nor would a different verdict have been reached.

8. If deponent, as attorney for the defendant, after having made a careful study of the jury panel put upon the defendant at the trial, had believed that a fair and impartial trial for the defendant could not have been obtained because no negro was named on that panel, proper objection to the panel would have been timely made or a change of venue requested. Deponent feels now, as he did at the trial, that the panel of outstanding white citizens of Jasper County was such that an impartial and fair trial could be had for the defendant without such constitutional question being raised or objection made, and deponent's failure therefore to make such objection did not deprive the defendant of any constitutional right to a fair and impartial trial, which in deponent's honest opinion, he received.

9. Deponent says that this affidavit is being made for the purpose of being used by the State in opposition to a motion for a new trial now pending in Case No. 8053, Jasper Superior Court.

J. Ben Warren.

Sworn to and subscribed before me on this the 2 day of November, 1961.

Harold Greer (Seal),
Ordinary Jasper Co.

It is ordered that the within affidavit, marked "State Exhibit No. 15" be filed; and it is further ordered that said exhibit become a part of the record in said case.

This 21st day of November, 1961.

George S. Carpenter,
J. S. C. O. C.

SUMMARY OF ARGUMENT.

Petitioner was represented at his trial by a capable and competent attorney who, in the exercise of his professional judgment, decided against raising the issue of systematic exclusion of Negroes from the Grand and traverse jury.

Petitioner has been indicted, tried and convicted of murder in conformity to constitutional requirements.

It is incumbent upon a person accused of a crime to raise any and all objections to the procedure, practice or jury composition timely and not await his trial and conviction and by motion for new trial attempt to raise new issues.

The decision of **U. S. ex rel. Goldsby v. Harpole** is not applicable to the case sub judice.

ARGUMENT.

The question as presented above is the ultimate issue the Petitioner has attempted to present to this Court. However, it would seem appropriate to raise a procedural question that would indicate that this Court should not grant certiorari. The procedural question to which reference is made is the time at which the question of systematic exclusion should be raised. This question is covered in **Williams v. Georgia**, 349 U. S. 375. In that case, this Court stated at page 382:

> "The question now before us, in view of the State's concession, is whether the ruling of the Georgia Supreme Court rests upon an adequate non-federal ground, so that this Court is without jurisdiction to review the Georgia court."

This Court then went on to conclude that it had jurisdiction on page 389:

> "But the fact that we have jurisdiction does not compel us to exercise it."

And at page 390 this Court stated:

> "In the instant case, there is an important factor which has intervened since the affirmance by the Georgia Supreme Court which impels us to remand for that Court's further consideration. This is the acknowledgment by the State before this Court that, as a matter of substantive law, Williams has been deprived of his constitutional rights. The Solicitor General of Fulton County, it should be recalled, had urged before the Georgia Supreme Court that no denial of equal protection was involved, and that court may well have been influenced by the contention."

Such is not the case in the matter presently before this Court for the Supreme Court of Georgia stated its general

rule that failure to timely challenge the array of grand jurors and traverse jurors amounts to a waiver of such objection and can not thereafter be made a ground of a motion for new trial. But the court did not stop there for it went on to consider this case in accordance with a long standing exception to the above rule. This exception was stated by the Supreme Court of Georgia as follows: "where a person accused of a crime is not afforded the opportunity to make appropriate objections to the illegal composition of the grand jury or the traverse jury before indictment or during the progress of the trial, he may raise the issue by motion for new trial or by habeas corpus proceedings."

In considering the above exception the Supreme Court of Georgia stated:

> "The insistence that where, as in the case under review, the accused on account of youth, inexperience, and ignorance was incapable of comprehending what his constitutional rights were, but that nevertheless his personal assent to any waiver of the same was necessary in order that he be precluded from insisting upon the same by motion for new trial made subsequent to indictment, trial, and conviction, and could not be waived by counsel who conducted his trial are decidedly adversely to the defendant in reported opinions of this court and the Supreme Court of the United States. In the case of **Michel v. Louisiana,** 350 U. S. 91 (1, 2) (100 L. Ed. 83, 76 Sup. Ct. 158), it is held: 'Louisiana law requires that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever is earlier.' After expiration of the time allowed, these three Negro petitioners moved to quash their indictments on the ground that there was systematic exclusion of Negroes from the grand juries which indicted them. Their motions were

denied and each was convicted of a capital offense. **Held:** In the circumstances of these cases, application of the rule to these petitioners did not violate the Fourteenth Amendment.

"Michel was indicted on February 19 and presented for arraignment on February 23. He appeared without counsel, and arraignment was continued for one week. The record shows that counsel was appointed for him on March 2, the date the grand jury term expired. Counsel contended that he did not consider himself appointed until March 5, when he received written notice from the court. The motion to quash, not filed until March 9, was denied as being out of time. **Held:** The finding of the lower courts that counsel was appointed March 2 is sustained. Since the appointed counsel, a lawyer experienced in state criminal practice, had adequate time to file the motion after his appointment, application of the rule was not unreasonable."

"5. There are few better settled principles of criminal jurisprudence than that where the accused has attained the age when he may be legally put upon trial for a criminal offense, but lacks intelligence, experience, or knowledge sufficient to enable him to decide upon whether the waiver of a legal or constitutional right is beneficial to his defense, such waiver may be made in his behalf by counsel appointed by the court to defend him. **Michel v. Louisiana,** 350 U. S. 91, supra; **Wilcoxin v. Aldredge,** 193 Ga. 661 (19 S. E. 2d 499).

"Where, as here, the defendant knows nothing of his rights or whether it would be strategically wise to waive them in certain situations, it would be to require a vain and useless thing that he personally consent to such waiver. If appointed counsel had been compelled to consult and be controlled by the

directions given him by his client, who was only fifteen years old, and according to his own insistence, knew nothing of law, courts or legal procedure, his usefulness would have been destroyed and the defendant would not have been represented by counsel within the meaning of Art. I, Sec. 1, Par. V of the Georgia Constitution (Code Ann., Sec. 2-105).

"6. The issues as to whether the court-appointed counsel had ability to raise the issue as to the illegal composition of the grand and traverse juries of Jasper County, and whether he was derelict in the performance of his obligation to the defendant in not raising the issues were heard and determined adversely to the defendant by the trial judge. The judge had submitted to him evidence sufficient to support his findings that the appointed counsel, a man of unquestionable integrity, was an able attorney of long experience, skill, and ability, and that he was not derelict to his duty in defending the accused."

The foregoing shows the Supreme Court of Georgia considered the question and decided the raising of the constitutional question had been waived.

That raising of the question was considered by the Defense Counsel and that same was actually waived by him is borne out by the affidavit of said counsel which is set forth in the preceding statement.

"In Wilcoxon v. Aldredge, 192 Ga. 634, at page 636 (2), it is held:

"'One complaint in the petition is that members of applicant's race were systematically and arbitrarily excluded from the jury lists of Cobb County, in violation of the 14th amendment of the Federal Constitution, and art. 1, par. 3 of the State Constitution (Code Sections 1-815, 2-103). This does not present a ground for habeas corpus,

for the reason that an objection of this kind should have been presented in a proper way at the trial, and upon failure to do so **it is to be considered as waived.** Phillips v. Brown, 122 Ga. 571 (50 S. E. 361); Smith v. Milton, 149 Ga. 28 (98 S. E. 607). We are of course familiar with the rulings of the Supreme Court of the United States, that "Exclusion of all negroes from a grand jury by which a negro is indicted, or from the petit jury by which he is tried for the offense, resulting from systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color, is a denial of the equal protection of the laws guaranteed to him by the 14th amendment." Norris v. Alabama, 294 U. S. 587 (55 Sup. Ct. 579, 79 L. ed. 1074); Strouder v. West Virginia, 100 U. S. 303 (25 L. ed. 684); Ex parte Virginia, 100 U. S. 339 (25 L. ed. 676); Gibson v. Mississippi, 162 U. S. 565 (16 Sup. Ct. 904, 40 L. ed. 1075); Rogers v. Alabama, 192 U. S. 226 (24 Sup. Ct. 257, 48 L. ed. 417); Martin v. Texas, 200 U. S. 316 (26 Sup. Ct. 338, 50 L. ed. 497); Hollins v. Oklahoma, 295 U. S. 394 (55 Sup. Ct. 784, 79 L. ed. 1500); Hale v. Kentucky, 303 U. S. 613 (58 Sup. Ct. 753, 82 L. ed. 1050); Pierce v. Louisiana, 306 U. S. 354 (59 Sup. Ct. 536, 83 L. ed. 757). See Wilson v. State, 69 Ga. 224, 236, 237; Bashlor v. Bacon, 168 Ga. 370 (147 S. E. 762). In all of those cases the point was timely made, and was not, as here, presented after conviction, by a petition for habeas corpus. The applicant had the right to require a jury, both grand and petit, duly organized in accordance with constitutional principles; **but he could not either negligently or purposely stand silently by in this respect, taking the chances of an acquittal, and upon conviction seek to thus nullify his trial.**

> **It is settled that constitutional questions may be waived by failure to comply with reasonable procedural requirements.** Frank v. Mangum, 237 U. S. 309 (35 Sup. Ct. 582, 59 L. ed. 969); Meyers v. Whittle, 171 Ga. 509 (156 S. E. 120); In re Wood, 140 U. S. 278 (11 Sup. Ct. 738, 35 L. ed. 505), **it was recognized that a failure to raise a question of the character now involved in the trial court would amount to a waiver so that habeas corpus would not lie.** See in re Jugiro, 140 U. S. 291 (11 Sup. Ct. 770, 35 L. ed. 510); Andrews v. Swartz, 156 U. S. 272 (15 Sup. Ct. 389, 39 L. ed. 422); Hale v. Crawford, 65 Fed. 2d 739; Taylor v. Hudspeth, 113 Fed. 2d 825; State ex rel. Dunlap v. Utecht, 206 Minn. 41 (287 N. W. 229); 29 C. J. 42; Yeates v. Robertson, 4 Ga. App. 573 (62 S. E. 104).' " (Emphasis by writer.)

Counsel for petitioners place great emphasis upon the fact that it was not **propitious** for court-appointed counsel to raise the issue of the exclusion of Negroes from Jury service and rely heavily upon **United States ex rel. Goldsby v. Harpole,** 263 F. 2d 71 (C. A. 5, 1959).

Admittedly, the failure to raise the issue of exclusion and the **United States ex rel. Goldsby v. Harpole** decision are the most unfavorable factors the State of Georgia must answer. However, it is submitted that there are facts in the record to support the position of Georgia that neither the failure to raise the issue of exclusion nor the **United States ex rel. Goldsby v. Harpole** decision control the case here before the court.

Dealing first with the exclusion issue, it is admitted, and the Supreme Court of Georgia, as well as this Court, hold that systematic exclusion is prohibited. However, even though prohibited, and where properly brought before the trial court is a good defense, it is incumbent upon the

person desiring to take advantage thereof to do so properly and timely.

The petitioner in this case attempts to avoid the failure to raise the question of exclusion **timely** by asserting that there has been no valid waiver of his constitutional right to object to such exclusion from the Grand Jury which indicted him and the traverse jury which tried and convicted him "in the absence of an affirmative showing that he (or his parent or guardian) understood what his rights were, fully appreciated his entitlement to challenge the jury and the meaning of failing to do so, and acquiesced in the decision of court-appointed white counsel not to assert petitioner's guaranteed right to be indicted and tried by a grand jury and traverse jury which conformed to basic constitutional requirements" (Petition for a Writ of Certiorari to the Supreme Court of Georgia, p. 6, 2d par.).

The opinion of the Supreme Court of Georgia dealt ably with this issue and the statements therein are adopted herein.

The question, as to the exclusion issue, narrows itself to whether it is incumbent upon the State, in a criminal prosecution, to prove the absence of systematic exclusion or whether it is incumbent upon an accused to raise the issue of systematic exclusion **timely**.

United States ex rel. Goldsby v. Harpole.

It is submitted that **Harpole** is not controlling in this case in that court-appointed counsel for petitioner considered raising the question of systematic exclusion and in the exercise of his responsibility as court-appointed counsel, decided that the interest of his client would best be served by not raising the issue and to rely upon the youth of the petitioner. Without more, this should distinguish **Harpole**, where counsel who desired to raise the

systematic issue was not permitted to participate in the trial of the accused.

In **Harpole**, no showing is made that counsel who represented the accused during the trial considered raising the systematic exclusion issue. Here a contrary showing has been made.

The case of **Williams v. State**, 210 Ga. 665, was carried to U. S. Supreme Court which remanded it to the Supreme Court of Georgia for further consideration and the Supreme Court of Georgia held (see **Williams v. State**, 211 Ga. 763):

> "The powers not delegated to the United States by the Constitution, prohibited by it to the States, are reserved to the States respectively, or to the people." Constitution of the United States, 10th Amendment; Code Section 1-810. "Even though executives and legislators, not being constitutional lawyers, might often overstep the foregoing unambiguous constitutional prohibition of Federal invasion of State jurisdiction, there can never be an acceptable excuse for judicial failure to strictly observe it. This court bows to the Supreme Court on all Federal questions of law, but we will not supinely surrender sovereign powers of this State. In this case the opinion of the majority of that court recognizes that this court decided the case according to established rules of law, and that no Federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of this court, which are the only judgments by that court that this court can constitutionally recognize.
>
> The Supreme Court undertakes to remand the case for further consideration, and in its opinion has pointed to Georgia law vesting in the trial judge discretion in ruling upon an extraordinary motion for new trial, and apparently concluded therefrom that

this court should reverse the trial court because that discretion was not exercised in the way the Supreme Court would have exercised it. We know and respect the universally recognized rule that the exercise of discretion never authorizes a violation or defiance of law. In this case, as pointed out by us, that law is that the question sought to be raised must be raised before trial and not otherwise.

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay, we state that our opinion in Williams v. State, 210 Ga. 665 (82 S. E. 2d 217), is supported by sound and unchallenged law, conforms with the State and Federal Constitutions, and stands as the judgment of all seven of the Justices of this Court."

It is submitted that the reasoning of **Harpole** is not applicable to the case at bar.

In **Summerour v. Fortson, Judge**, 174 Ga. 862, there was a review of the Supreme Court of Georgia of a case wherein a request was made for a mandamus to compel a trial judge in a criminal case to certify a bill of exceptions in which exception is taken to the judgment overruling an extraordinary motion for a new trial based on the failure of trial judge to appoint a guardian ad litem to represent a minor, who is 14 years of age or over, in the trial of a criminal case against him.

This case goes in great detail in discussing how a minor should be represented in a criminal case.

Quoting from page 870, it is stated:

"In **Bartley v. People**, 156 Ill. 230 (40 N. E. 831), the Supreme Court of Illinois said: 'There is nothing

in the statute or common law in conformity with which criminal trials are had in this State, requiring a different procedure where the defendant is a minor from that in other cases.' In that case it was 'Held that a **minor defendant in a criminal case might waive the requirement that he be furnished with a copy of the indictment and a list of the jurors and witnesses.** In **Cutler v. People,** 184 Ill. 395 (56 N. E. 751), the Supreme Court of Illinois declared that 'The procedure in criminal cases is the same whether the accused is an adult or a minor; and hence it is competent for a minor defendant **to waive** the requirement of section 52 of the practice act that instructions be given in writing.' "

Quoting from page 872:

" 'Our courts have uniformly adopted the practice of assigning counsel to represent indigent criminals in all cases when they were unable to employ counsel to represent them.' Delk v. State, 99 Ga. 667. This practice was followed in this case. The record discloses that this minor was represented by able and experienced counsel, who was appointed by the court to defend him, and who did defend him with skill and ability. When this practice is followed, and a minor defendant is represented by able and skillful counsel, the necessity for the appointment of a guardian ad litem, if such appointment was ever required under the laws of this State, has been superseded. Such representation is much more efficient and valuable than that by an unprofessional guardian ad litem, which is often perfunctory. Whenever attorneys at law are appointed by the court to represent minor defendants who are charged with crime, and such minors are so represented, such appointments are in effect and to all intents and purposes appointment of guardians ad litem.' "

CONCLUSION.

As has been shown the Supreme Court of Georgia decided this case on an adequate non-federal ground, i. e., the procedural time to raise objections to the composition of the grand jury and the traverse jury. As has been shown, the time to raise these questions did not slip by without counsel, but rather there was a decision by adequate court appointed counsel not to raise these questions.

Therefore, we respectfully submit that the writ should be denied.

Respectfully submitted,

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